Supreme Court, U.S.
FILED

06-298 AUG 28 2006

OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

INDUSTRIAL BANK, N.A.,

Petitioner,

v.

CITY BANK, SCOTT SEIDEL, CHAPTER 7 TRUSTEE and LARRY BROWN, Debtor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN L. TATUM
DONALD K. BUCKMAN
CANTEY & HANGER, LLP
801 Cherry Street, Suite 2100
Fort Worth, Texas 76102
817-877-2800

PERRY J. COCKERELL
Counsel of Record
CANTEY & HANGER, LLP
1999 Bryan Street, Suite 3330
Dallas, Texas 75201
214-978-4139

Attorneys for Petitioner

202130

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

This case presents the Court with an opportunity to resolve a significant conflict which exists among the circuit courts over a fundamental provision in bankruptcy law:

1. What is the effect of violating the automatic stay of 11 U.S.C. § 362?

    a. Is a stay violation "void" or "voidable"?

    b. If a stay violation is "void" or "voidable" can it be cured by retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1)?

2. Does the "effect of dismissal" under 11 U.S.C. § 349(b) validate an action that was taken in violation of the automatic stay under 11 U.S.C. § 362?

3. Must a creditor seek retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1) for a stay violation that occurred in a bankruptcy proceeding that has been dismissed?

CORPORATE DISCLOSURE STATEMENT

Petitioner hereby identifies IBW Financial Corporation as a parent corporation owning 10% or more of Petitioner's stock. No publicly held company owns 10% or more of the stock of Petitioner.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CITED AUTHORITIES	iv
TABLE OF APPENDICES	xii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	5
REASONS TO GRANT THE PETITION	10
CONCLUSION	30

TABLE OF CITED AUTHORITIES

Page

CASES

Administrator of EPA v. Pacific Legal Foundation, 445 U.S. 198, 100 S. Ct. 1095, 63 L. Ed 2d 329 (1980) 21-22

In re Albany Partners, 749 F.2d 670 (11th Cir. 1984) 13

Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Prop. Builders, Inc.), 699 F.2d 963 (9th Cir. 1982) 19

Barbieri v. RAJ Acquisition Corp., 199 F.3d 616 (2nd Cir. 1999) 19

Ex Parte Binse, 932 S.W. 2d 619 (Tex. App. – 1996) 26, 27

In re Brown, 330 B.R. 548 (N.D. Tex. 2005) 8, 18

Brazzel v. Murray, 481 S.W.2d 801 (Tex. 1972) ... 27

Bronson v. United States, 46 F.3d 1573 (Fed. Cir. 1995) 13

Burd v. Walters (In re Walters), 868 F.2d 665 (4th Cir. 1989) 12

Cited Authorities

Page

Camecho v. Homeq Servicing Corporation, 311 B.R. 186 (Bankr. E.D. Mich. 2004) 25

Cen-Pen Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995) 29

Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.), 345 F.3d 338 (5th Cir. 2003) 14

City Bank v. Industrial Bank, N.A., 2006 U.S. App. LEXIS 11157 (5th Cir. 2006) 9

Critical Care Support Servs., Inc. v. U.S. (In re Critical Care Support Servs.), 236 B.R. 137 (E.D. N.Y. 1999) 19

Easley v. Pettibone Michigan Corp., 990 F. 2d 905 (6th Cir. 1993) 13, 25, 26

Elbar Inv. v. Pierce (In re Pierce), 272 B.R. 198 (Bankr. S. D. Tex. 2001) 26

Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371 (10th Cir. 1990) 13

In re Garcia, 115 B.R. 169 (Bankr. N.D. Ind. 1990) 19

Gardens of Cortez v. John Hancock Mutl. Life Ins. Co., 585 F. 2d 975 (10th Cir. 1978) 29

Cited Authorities

Page

In re Garnett, 303 B.R. 274 (E.D. N.Y. 2003) 19

Goswami v. Metropolitan Savings and Loan Association, 751 S.W. 2d 487 (Tex. 1988) 26, 27

Huddleston v. Texas Commerce Bank-Dallas, N.A., 756 S.W.2d 343 (Tex. App. 1988) 26

Jones v. Garcia, 63 F. 3d 411 (5th Cir. 1995) 14

Kalb v. Feuerstein, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940) 11, 13, 14, 15, 22

In re Kinion, 207 F.3d 751 (5th Cir. 2000) 29

In re Lampkin, 116 B.R. 450 (Bankr. D. Md. 1990) .. 26

In re Linton, 35 B.R. 695 (Bankr. D. Idaho 1983) ... 22, 28

Matthews v. Rosene, 739 F.2d 249 (7th Cir. 1984) ... 13

In re Moreno, 4 S.W.3d 278 (Tex. App. 1999) 27

New York v. Saper, 336 U.S. 328 (1989) 10

Norton v. Hoxie State Bank, 61 B.R. 258 (D. Kan. 1986) 22

Oles v. Curl, 65 S.W.3d 129 (Tex. App. – Amarillo 2001, no pet.) 27

Cited Authorities

Page

In re Petty, 848 F. 2d 654 (5th Cir. 1988) 29

In re Pickett, 325 B.R. 579 (Bankr. E.D. Mich. 2005) 24

In re Pointer, 952 F.2d 82 (5th Cir. 1992) 29

In re: Presidio Bridge Co., Inc., 124 B.R. 242 (Bankr. W.D. Tex. 1991) 18

In re Prine, 222 B.R. 610 (Bankr. N.D. Iowa 1997) 26

Rexnord Holdings v. Bidermann, 21 F.3d 522 (2d Cir. 1994) 13

Riley v. United States, 118 F.3d 1220 (8th Cir. 1997) 15

In re Sanderfer, 2004 U.S. Dist. LEXIS 1139 (E.D. Tenn 2004) 25

In re Schwartz, 954 F.2d 569 (9th Cir. 1992) 13

Shell Oil v. Capital Financial Services, 170 B.R. 903 (S.D. Tex. 1994) 22, 24, 26

In re Siciliano, 13 F.3d 748 (3d Cir. 1994) 13

Sikes v. Global Marine, Inc., 881 F. 2d 176 (5th Cir. 1989) 7-8, 13, 14, 19, 26

Cited Authorities

Page

Singleton v. Wulff, 428 U.S. 106, 49 L. Ed 2d 826, 96 S. Ct. 2868 (1976) 22

Singleton v. Abusaad (In re Abusaad), 309 B.R. 895 (Bankr. N.D. Tex. 2004) 14

Smith v. First Am. Bank, N.A., 876 F.2d 524 (6th Cir. 1989) 15

In re Solar Equipment Corporation, 19 B.R 1010 (5th Cir. 1982) 29

In re Soares, 107 F.3d 969 (1st Cir. 1997) 13

In re Thornburg, 277 B.R. 719 (Bankr. E.D. Tex. 2002) 20

Tim Wargo & Sons, Inc. v. The Equitable Life Assurance Society of the United States, 34 Ark. App. 216, 809 S.W. 2d 375 (1991) 28

Valencia v. Rodriquez, 87 Cal. App. 4th 1222, 105 Cal. Rptr. 2d 281 (2001) 28

Winters ex rel. McMahon, 94 F.3d 130 (4th Cir. 1996) 15

In re Woodhaven, Ltd., 139 B.R. 745 (Bankr. N.D. Ala. 1992) 19

Cited Authorities

Page

UNITED STATES CONSTITUTION

Article I, Section 8 ..... 10, 11

STATUTES

11 U.S.C. § 349(b) ..... *passim*

11 U.S.C. § 350 ..... 18, 20

11 U.S.C. § 362 ..... *passim*

11 U.S.C. § 362(a) 11-12, 14

11 U.S.C. § 362(c)(2) 8, 12, 19

11 U.S.C. § 362(d)(1) ..... *passim*

11 U.S.C. § 506(d) 5, 17

11 U.S.C. § 510(c)(2) 4, 17

11 U.S.C. § 522(i)(2) 4, 17

11 U.S.C. § 542(c) 4, 17

11 U.S.C. § 544 ..... 4, 17

11 U.S.C. § 547 ..... 4, 17

11 U.S.C. § 548 ..... 4, 17

Cited Authorities

Page

11 U.S.C. § 549 ..... 4, 14, 17

11 U.S.C. § 551 ..... 4, 17

11 U.S.C. § 1101 6

11 U.S.C. § 1301 6

28 U.S.C. § 1254(1) 1

BANKRUPTCY RULES

B.R. 7001(2) 2

LAW REVIEW ARTICLES

Barnes, "The Plain Meaning of the Automatic Stay in Bankruptcy: The Void/Voidable Distinction Revisited," 57 Ohio St. L. J. 291 (1996) 15

Lichtenstein, "Violations of the Automatic Stay: Void or Voidable? 23-4 ABIJ 20 (May 2004) 15

Niccolini, "The Voidability of Actions Taken in Violation of the Automatic Stay: Application of the Information-Forcing Paradigm," 45 Vand. L. Rev. 1663 (1992) 15

Tobar, "The Need for Uniform Void Ab Initio Standard for Violations of the Automatic Stay," 24 Whittier L. Rev. 3 (Fall 2002) 15

Page

LEGISLATIVE HISTORY

H.R. No. 95-595, 95th Cong., 1st Sess. 337-40 (1977) 12, 18

S. R. No. 95-989, 95th Cong., 2d Sess. 48-49, 54-55 (1978) 12, 18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed May 4, 2006 ..... 1a

Appendix B — Memorandum Opinion And Order, And Final Judgment Of The United States District Court For The Northern District Of Texas, Fort Worth Division Decided And Filed June 21, 2005 ..... 3a

Appendix C — Memorandum Opinion And Order Of The United States Bankruptcy Court For The Northern District Of Texas, Fort Worth Division Dated November 15, 2004 ..... 20a

Appendix D — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Filed May 31, 2006 ..... 31a

Petitioner Industrial Bank, N.A., respectfully petitions for a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reproduced in the Appendix at App. A. The opinion of the district court is reproduced in the Appendix at App. B. The opinion of the bankruptcy court is reproduced in the Appendix at App. C.

JURISDICTION

The court of appeals judgment was entered on May 4, 2006. A timely petition for rehearing was denied on May 31, 2006. App. D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8:

The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States;

2. 11 U.S.C. § 362:

Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of

this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

or

3. 11 U.S.C. § 349:

Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

STATEMENT

Petitioner seeks review of the ruling of the Fifth Circuit Court of Appeals which reversed the district court and affirmed the bankruptcy court's ruling that reclassified Petitioner's proof of claim from a secured claim to an unsecured claim.

The debtor in bankruptcy below is Larry Brown, a former professional football player who played for the Dallas Cowboys and Oakland Raiders. While playing for the Dallas Cowboys, he was named the Most Valuable Player in Super Bowl 1996. While playing for the Oakland Raiders he earned an NFL Deferred Compensation Agreement that was worth $1.2 million.

After retiring from football, Brown went into business in Fort Worth, Texas. In 2002, he approached the Petitioner, a banking institution in Washington, D.C., for a loan for business use. Petitioner granted the loan but Brown failed to

repay it when it became due. Brown filed a series of bankruptcy proceedings to reorganize his debts as will be explained below.

The First Bankruptcy Proceeding.

In 2002, Brown filed his first bankruptcy proceeding under Chapter 13 of the Bankruptcy Code. 11 U.S.C. §1301, *et seq.* That proceeding was dismissed, reinstated and then dismissed. App. C. Petitioner was not listed as a creditor and it had no knowledge of the bankruptcy proceeding when it filed suit to recover its debt in a Washington, D.C. court. Petitioner obtained a judgment by default in the amount of $251,474.02.

The Second Bankruptcy Proceeding.

Brown filed a second bankruptcy proceeding in 2003. This proceeding was under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §1101, *et seq.* During this proceeding, Petitioner had its default judgment recognized in California. It had a writ of execution issued and served by the sheriff against Brown's NFL Deferred Compensation Agreement with the Oakland Raiders.

The Oakland Raiders acknowledged the writ and responded that it would begin making payments in December 2005. City Bank was a creditor in the second bankruptcy proceeding and examined Brown under Bankruptcy Rule 2004 regarding the Deferred Compensation Agreement with the Oakland Raiders and other issues. The second bankruptcy proceeding was dismissed at the request of the United States Trustee because Brown failed to comply with Chapter 11 requirements. The United States Trustee also requested a

conversion to Chapter 7 or the appointment of a trustee. Neither City Bank, Brown, nor other creditors objected to dismissal of the Chapter 11 proceeding. For a second time Petitioner was not listed as a creditor in Brown's bankruptcy proceeding and it had no knowledge of the proceeding while it took its actions.

The Third Bankruptcy Proceeding.

Brown filed a third bankruptcy proceeding in 2004. This proceeding also was under Chapter 11 of the Bankruptcy Code. Petitioner had its judgment recognized in Texas and sought post-judgment discovery against Brown. It secured a state court sanction order against Brown for his failure to appear at a post-judgment deposition. As before, Brown failed to list Petitioner as a creditor and Petitioner had no knowledge of the bankruptcy proceeding when it took its actions. Only after this state court order was entered did Brown formally notify Petitioner of his third bankruptcy proceeding. Petitioner then filed a fully secured proof of claim based on its default judgment and execution lien against the Deferred Compensation Agreement with the Oakland Raiders.

The Objection to Petitioner's Claim.

City Bank, a creditor that was later joined by Brown before trial, objected to Petitioner's secured claim. It contended that Petitioner achieved its secured status by violating the automatic stay under 11 U.S.C. § 362 that was in effect during the two previous bankruptcy proceedings. City Bank contended that Petitioner's actions were *void* until Petitioner obtained retroactive annulment of the automatic stays of the prior proceedings based on the Fifth Circuit holding in *Sikes v. Global Marine, Inc.* 881 F. 2d 176

(5th Cir. 1989). *Sikes v. Global Marine* is the leading case in the Fifth Circuit that holds that stay violations are voidable and can be retroactively validated by a bankruptcy court under 11 U.S.C. § 362(d)(1). Petitioner contended that the automatic stays of the prior cases were lifted upon dismissal under 11 U.S.C. § 362(c)(2) and that its actions were validated by the "effect of dismissal" under 11 U.S.C. § 349(b). Alternatively, Petitioner requested retroactive annulment of the automatic stays of the prior proceedings under 11 U.S.C. § 362(d)(1) based on equitable factors.

The bankruptcy court agreed with City Bank and held that Petitioner's claim was to be treated as unsecured because Petitioner improved its position due to its violations of the automatic stay during the previous proceedings and that the other creditors should not suffer a detriment because Brown failed to give notice of his bankruptcy filings. App. C. It found no grounds to retroactively annul the automatic stay based on equitable factors under 11 U.S.C. § 362(d)(1). App. C. Petitioner appealed to the district court.

The District Court Decision.

The district court agreed with Petitioner and reversed the bankruptcy court. App. B. It held that the automatic stays of the previous proceedings were lifted upon dismissal and that violations that occurred during those proceedings were cleansed upon dismissal based on 11 U.S.C. § 349(b), along with its legislative history and case law that supported its position. App. B. It held that the case was not governed by retroactive annulment under 11 U.S.C. § 362(d) (1) and it did not review the bankruptcy court's decision not to retroactively annul the automatic stay. App. B. *In re Brown*, 330 B.R. 548 (N.D. Tex. 2005). The district court ordered

Petitioner's claim to be treated as a fully secured claim and that it be given the benefit of its actions taken during the pendency of the first two bankruptcy proceedings. App. B.

After the district court's opinion, Brown's third bankruptcy proceeding was converted to Chapter 7. Scott Seidel was appointed Trustee and along with City Bank appealed the decision to the Fifth Circuit. Seidel did not participate in the proceedings at the bankruptcy court or the district court level. Seidel did participate at the Fifth Circuit level.

The Fifth Circuit Decision.

The Fifth Circuit reversed the district court in an unpublished decision. *City Bank v. Industrial Bank, N.A.*, 2006 U.S. App. LEXIS 11157 (5th Cir. 2006); App A. It held that the district court erred as a matter of law in concluding that the dismissal of the two previous bankruptcy proceedings necessarily served both to lift the automatic stay and to cleanse Petitioner's violations of the stay. App. A. It found that retroactive validation of actions taken in violation of an automatic stay is reserved to the discretion of bankruptcy courts and that the courts are cautioned to use this discretion sparingly because of the adverse impact that validation could have on other creditors who honored the stay. App. A. The Fifth Circuit found that the bankruptcy court correctly exercised that discretion. App. A. The Fifth Circuit denied a petition for rehearing filed by Petitioner. App. D.

REASONS TO GRANT THE PETITION

A. **The federal circuits are in conflict with regard to whether violations of the automatic stay of 11 U.S.C. § 362 are to be treated as "void" or "voidable." This court should grant review to decide this fundamental question because: (1) the answer to this question is of considerable practical importance in the administration of the Bankruptcy Code; (2) there is no "uniform" rule among the circuit courts with regard to the effect of violating the automatic stay under 11 U.S.C. § 362; and (3) Article I, Section 8 of the United States Constitution requires there to be "uniform Laws on the subject of Bankruptcies throughout the United States."**

In 1989, this Court granted certiorari in *New York v. Saper*, 336 U.S. 328 (1989) to resolve a conflict in the circuit courts regarding whether tax claims would bear interest until the date of bankruptcy or until payment. This Court considered that issue to be of considerable practical importance in the administration of the Bankruptcy Act that it merited review so that it could resolve the conflict.

This case reaches that level of practical importance because whether an action that violates 11 U.S.C. § 362 is "void" or "voidable" is an issue that potentially reaches every bankruptcy petition that is filed. Yet, in somewhat of an incredible turn of events since the Bankruptcy Code was adopted in 1978, the effect of violating the automatic stay under 11 U.S.C. § 362 is *not resolved among the federal circuit courts.*

The unanswered question in bankruptcy law has become: What is the effect of violating the automatic stay under 11 U.S.C. § 362? The circuit courts are hopelessly divided over whether a stay violation is "void" and cannot be cured or "voidable" and can be cured by retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1).

Article I, Section 8 of the United States Constitution provides that Congress shall have "Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Because there is no uniform rule with regard to whether a stay violation is "void" or "voidable" and whether such violations can be cured, or are cured upon dismissal, there is nothing *". . . uniform . . . on the subject of Bankruptcies. . . ."* with regards to the effect of violating the automatic stay under 11 U.S.C. § 362.

1. This Court's Holding in *Kalb v. Feuerstein.*

This Court most recently dealt with the effect of violating the automatic stay in *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940) which was under the Bankruptcy Act of 1898. This Court held that under former Section 75 of that Act, actions that violated the automatic stay were *void ab initio* and could not be cured.

2. The Automatic Stay under the Bankruptcy Code.

Section 362 of the Bankruptcy Code operates "as a stay, applicable to all entities" from the commencement or continuation of proceedings that could have been commenced before the commencement of a case under Title 11, to obtain possession of property of or from the estate or to perfect or enforce any lien against property of the estate. 11 U.S.C.

§ 362(a). The automatic stay relieves the debtor from the pressure and harassment of creditors seeking to collect their claims. It is considered a fundamental debtor protection that gives the debtor a breathing spell from creditors and permits the debtor to attempt a repayment or reorganization plan, or to be relieved of the financial pressures that drove him into bankruptcy. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978).

Unless an exception exists, the stay applies upon the commencement of a bankruptcy proceeding. The stay may be annulled upon request under 11 U.S.C. § 362(d)(1). Otherwise the stay automatically lifts when the debtor receives a discharge or when the bankruptcy proceeding is dismissed or closed. 11 U.S.C. § 362(c)(2).

When Section 362 of the Bankruptcy Code was adopted, it contained no express provision governing the consequences for violating the automatic stay. In 1984, Congress added Section 362(h) (later moved to Section 362(k)(1)) to the Bankruptcy Code, allowing individual debtors (such as Larry Brown) to recover damages for willful violations of the automatic stay. Pub. L. 98-353, § 304. There is no doubt that bankruptcy courts were provided with authority to sanction stay violations under their civil contempt powers or to provide relief through 11 U.S.C. § 105. *Burd v. Walters, (In re Walters)*, 868 F. 2d 665 (4th Cir. 1989).

3. The Federal Circuits Address the "Void/ Voidable" Debate.

In construing the effect of violating the automatic stay under 11 U.S.C. § 362, many circuit courts relied on this

Court's holding in *Kalb v. Feuerstein* in determining that stay violations under the new Bankruptcy Code were also *void* and could not be cured. These included the First, Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *In re Soares*, 107 F.3d 969, 976 (1st Cir. 1997); *Rexnord Holdings v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994); *In re Graves*, 33 F.3d 242, 248 (3d Cir. 1994); *Smith v. First Am. Bank, N.A.*, 876 F.2d 524, 526 (6th Cir. 1989); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *In re Albany Partners*, 749 F.2d 670, 675 (11th Cir. 1984).

The Third, Sixth and Eleventh Circuits determined that actions that violated the automatic stay were *void*, but that Section 362(d)(1) permitted bankruptcy courts in appropriately limited circumstances to grant retroactive relief from the automatic stay. *In re Siciliano*, 13 F. 3d 748, 750 (3d Cir. 1994); *Easley v. Pettibone Michigan Corp.*, 990 F. 2d 905, 907 (6th Cir. 1993); *In re Albany Partners*, 749 F.2d 670, 675 (11th Cir. 1984). The Sixth Circuit's holding in *Easley* placed that circuit on both sides of this issue because by recognizing that *void* actions could nevertheless be cured by the bankruptcy courts.

The Fifth and Federal Circuits held that violations of the automatic stay were *voidable*. *Sikes v. Global Marine, Inc.*, 881 F. 2d 176 (5th Cir. 1989); *Bronson v. United States*, 46 F. 3d 1573 (Fed. Cir. 1995). The Fifth Circuit reasoned in *Sikes v. Global Marine* that the power of the bankruptcy court under the Bankruptcy Code to retroactively annul the automatic stay required treating of an act violating the stay as "voidable" and not "void" because a "void" act is an act that is "nugatory [sic] of no effect and cannot be cured"

whereas a "voidable" act "may be either voided or cured." *Id.* at 178. The Fifth Circuit in *Sikes v. Global Marine* interpreted 11 U.S.C. § 362(d)(1) as providing bankruptcy courts with the power to retroactively annul the automatic stay back to the filing date of the petition. *Id.* at 179. One bankruptcy court in the Fifth Circuit, *Singleton v. Abusaad (In re Abusaad)*, 309 B.R. 895 (Bankr. N.D. Tex. 2004), held that *Kalb v. Feuerstein* was "no longer the law, at least in the Fifth Circuit" because of the manner in which the Fifth Circuit distinguished it in *Sikes v. Global Marine*. *Singleton*, 309 B.R. at 898.

The Fifth Circuit's rationale in *Sikes v. Global Marine* comes from a reading of other provisions of the Bankruptcy Code that validate some transactions that are made in violation of the automatic stay unless they are avoided at the trustee's discretion. For example, Section 549 of the Bankruptcy Code deems post-petition transfers by the debtor, without court authorization, subject to being set aside. *Sikes v. Global Marine*, at 179. It also found that Section 542(c) ratified transfers by parties having no knowledge of the bankruptcy case and that "[i]f everything done post-petition were void in the strict sense of the word, these provisions would either be meaningless or inconsistent with the specific mandate of section 362(a)." *Id.* The Fifth Circuit reaffirmed its holding in *Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.)*, 345 F. 3d 338 (5th Cir. 2003). However, a creditor must seek a ratification of an action that may violate the automatic stay by requesting a "judicial cure" for its past actions in violation of Section 362. *See*, e.g., *Jones v. Garcia*, 63 F. 3d 411 (5th Cir. 1995) (foreclosure sale in violation of the automatic stay was validated by retroactive annulment of the automatic stay). This is not the case in the other circuits that have adopted the "void" rule, except for the Third, Sixth

and Eleventh which provide retroactive annulment for even "void" acts.

The Fourth Circuit and the Eighth Circuit have not taken positions on the void/voidable debate. *Winters ex rel. McMahon*, 94 F. 3d 130, 136 (4th Cir. 1996); *Riley v. United States*, 118 F. 3d 1220, 1222 n.1 (8th Cir. 1997).

4. An Opportunity to Answer a Longstanding Dilemma.

The federal courts are hopelessly divided over whether a violation of Section 362 is void or voidable and curable by retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1). It would also be instructive to all bankruptcy courts on how to deal with stay violations on a uniform basis that is intended by the United States Constitution.

Almost 30 years have passed since Section 362 of the Bankruptcy Code was adopted. It has been almost 70 years since *Kalb v. Feuerstein* was decided under the Bankruptcy Act of 1898. A uniform standard for violations of the automatic stay is long overdue. *See*, e.g. "Violations of the Automatic Stay: Void or Voidable?" 23-4 ABIJ 20 (May 2004); Tobar, "The Need for Uniform Void Ab Initio Standard for Violations of the Automatic Stay," 24 Whittier L. Rev. 3 (Fall 2002); Barnes, "The Plain Meaning of the Automatic Stay in Bankruptcy: The Void/Voidable Distinction Revisited," 57 Ohio St. L. J. 291 (1996); Niccolini, "The Voidability of Actions Taken in Violation of the Automatic Stay: Application of the Information-Forcing Paradigm," 45 Vand. L. Rev. 1663, 1664 (1992).

B. **Because the courts are in conflict with regard to whether a stay violation is "void" or "voidable" under 11 U.S.C. § 362 this has created a conflict with regard to the "effect of dismissal" under 11 U.S.C. § 349(b). The conflict has also led to inconsistent results in state courts which must interpret Sections 349 and 362 if there is no follow-on bankruptcy proceeding.**

Because the issue of whether a stay violation is either "void" or "voidable" has not been resolved, this has led to confusion among the federal courts as to how to deal with stay violations that occurred during previous bankruptcy proceedings. Where there is no subsequent bankruptcy proceeding, then state courts are also divided over whether a stay violation is validated upon dismissal. There is no clear guidance from the federal courts. The Court should accept this petition because, like the first issue above, before this Court can determine "the effect of dismissal" under 11 U.S.C. § 349(b) it must be known whether a stay violation is "void" or "voidable" and can be cured by retroactive annulment under 11 U.S.C. § 362(d) (1) or whether retroactive annulment is required in a subsequent proceeding with regard to a stay violation that occurred in a previous bankruptcy proceeding.

1. The Effect of Dismissal under Section 349.

Section 349 of the Bankruptcy Code provides:

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice

the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

The legislative history of Section 349(b) provides that the basic purpose of subsection (b) is to "undo the bankruptcy case, as far as practicable . . ." H.R. No. 95-595, 95th Cong., 1st Sess. 337-38 (1977); S. R. No. 95-989, 95th Cong., 2d Sess. 48-9 (1978) The district court held that the introductory language of Section 349(b) suggested that the effect of the statute could be modified on a case-by-case basis "for cause," but that modification would have to be made at the time and as a part of the dismissal of the case. *In re Brown*, 330 B.R. 548, 554. App. B. In other words, in order to preserve an action to set aside a stay violation, the bankruptcy court could have conditioned dismissal of the previous bankruptcy proceedings upon preserving an action to set aside a stay violation in the dismissal order itself. Neither Brown nor any creditor requested the authority to maintain a cause of action against any creditor after dismissal.

2. A Dismissed Proceeding Cannot Be Reopened under Section 350.

Under 11 U.S.C. § 350 only a "closed" proceeding can be reopened. Section 350(a) provides that "after an estate is fully administered and the court has discharged the trustee, the court shall close the case." In a closed proceeding the court has fully administered the assets and the trustee is discharged. H. Rep. No. 95-595, 95th Cong., 1st Sess. 338 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 49 (1978) At least one court has refused to reopen a "closed" proceeding in order to lift the automatic stay because of a potential violation of the automatic stay because it no longer had jurisdiction over the property. *In re*: *Presidio Bridge Co., Inc.*, 124 B.R. 242 (Bankr. W.D. Tex. 1991).

A "dismissed" proceeding accomplishes a completely different result by restoring the property back to the position it held at the petition date. *Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Prop. Builders, Inc.)*, 699 F. 2d 963, 965 (9th Cir. 1982); *Critical Care Support Servs., Inc. v. U.S. (In re Critical Care Support Servs.)*, 236 B.R. 137, 140-41 (E.D. N.Y. 1999); *In re Woodhaven, Ltd.*, 139 B.R. 745, 747 (Bankr. N.D. Ala. 1992); *In re Garcia*, 115 B.R. 169, 170 (Bankr. N.D. Ind. 1990).

3. The Effect of Termination of the Stay under Section 362(c)(2).

In the case before the Court, the automatic stays of 11 U.S.C. § 362 during the two previous proceedings remained in effect until those proceedings were dismissed. 11 U.S.C. § 362(c)(2). Dismissal of the bankruptcy petition had the simultaneous effect of undoing the bankruptcy estate and lifting the automatic stay, just as the filing of the petition automatically and simultaneously created the bankruptcy estate and imposed the automatic stay. *In re Garnett*, 303 B.R. 274 (E.D. N.Y. 2003). Dismissal served as a forfeiture of the automatic stay that was in effect during those proceedings. *Barbieri v. RAJ Acquisition Corp.*, 199 F. 3d 616 (2d Cir. 1999).

As noted earlier, in the Fifth Circuit, if a creditor learns of its stay violation during the pendency of the proceeding, it can take action to retroactively annul the automatic stay under 11 U.S.C. § 362(d)(1) back to the petition filing date according to that circuit's holding in *Sikes v. Global Marine.* But if the creditor takes action in violation of the automatic stay and has no knowledge of the bankruptcy proceeding prior to dismissal, the creditor cannot reopen the proceeding to

validate its action because as noted above, a "dismissed" proceeding cannot be reopened under 11 U.S.C. § 350.

4. The Effect of Dismissal vs. Retroactive Annulment.

The bankruptcy court held that Petitioner's claim was unsecured on these grounds: (1) that the automatic stay was to protect an equitable distribution; (2) that the automatic stay applied regardless of whether Petitioner had notice; and (3) that the Fifth Circuit held that actions that violate the stay are voidable and that no compelling circumstances existed to annul the automatic stay under *In re Thornburg*, 277 B.R. 719, 731 (Bankr. E.D. Tex. 2002). App. C. The bankruptcy court refused to exercise its discretion to retroactively annul the automatic stay under 11 U.S.C. § 362(d)(1).

The bankruptcy court's opinion is silent on the "effect of dismissal" under Section 349(b) of the Bankruptcy Code. It can be assumed that the bankruptcy court believed that it had the power to retroactively annul the automatic stays during the previous bankruptcy proceedings because it refused to do so citing no compelling circumstances. Because of a complete absence of discussion of Section 349(b) by the bankruptcy court, it must be concluded that the bankruptcy court did not consider the "effect of dismissal" under Section 349(b) as a viable argument that validated Petitioner's actions. The bankruptcy court did consider the effect of dismissal at trial:

> THE COURT: Well, if any of the Fifth Circuit cases that you're citing to me . . . did any of them involve a stay which was being dealt with where

> the case in which the stay existed had been dismissed?

(Transcript of Proceedings, 9/27/2004 at 8).

The Fifth Circuit panel agreed with the bankruptcy court in its opinion:

> . . . the bankruptcy court correctly recognized that the dismissal of a bankruptcy proceeding does not necessarily retroactively validate actions taken in violation of an automatic stay.

App. A.

However, the bankruptcy court's opinion at Appendix C was not based on the holding that dismissal necessarily validated actions taken in violation of the automatic stay. As mentioned above, the bankruptcy court never cited to Section 349(b) nor discussed the "effect of dismissal" or the case law which was the primary basis for the district court's opinion. The district court considered Sections 349(b) and 362(d)(1) as separate and distinct grounds in analyzing Petitioner's actions. The Fifth Circuit has now affirmed the bankruptcy court's opinion on the basis of Section 349(b), which is a ground that was never reached by the bankruptcy court. *See*, App. A, App. C. Further, since the district court never passed on the bankruptcy court's refusal to retroactively annul the automatic stay under Section 362(d)(1), and assuming that retroactive annulment is still possible after dismissal, the Fifth Circuit should have remanded the case to the district court to determine whether the bankruptcy court erred in refusing to annul the automatic stay. *Administrator of EPA v. Pacific Legal Foundation*, 445 U.S. 198, 100 S.

Ct. 1095, 63 L. Ed 2d 329 (1980) (court does not address issues for the first time on appeal and remanded to the EPA for initial determination). *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L. Ed 2d 826, 96 S. Ct. 2868 (1976) (appellate courts generally do not address issues not reached by the district court).

The district court's decision was the best reasoned. It followed the holdings of earlier cases such as *In re Linton*, 35 B.R. 695 (Bankr. D. Idaho 1983), *Norton v. Hoxie State Bank*, 61 B.R. 258 (D. Kan. 1986) and *Shell Oil v. Capital Financial Services*, 170 B.R. 903, 906 (S.D. Tex. 1994) that dealt with the precise issue that is before the Court. *In re Linton*, rendered in 1983 only a few years after the adoption of the Bankruptcy Code, correctly frames the issue:

> It is generally accepted that acts taken in violation of the stay, and thus in violation of the jurisdiction of the Bankruptcy Court, are void and without effect. *See Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940); *First Security Bank of Idaho v. Ricks*, 26 BR 134, 83 IBCR 1 (B.C. D. *Id.* 1983). The language of § 349 restores "avoided" transfers, but it does not specifically address either those acts which might have been avoided but were not or those acts which might be viewed as jurisdictionally "void" rather than "avoidable."
>
> *Kalb* concerned an attempted foreclosure of a creditor's interest against property of the estate subsequent to the filing of the petition for relief under the Bankruptcy Act of 1898. Section 75 of the Act created a statutory stay similar to § 362 of

the existing Code. That case essentially established that an act of foreclosure taken in violation of the specific injunctive provisions of the federal bankruptcy statutes was subject to collateral attack in the bankruptcy proceeding and would therein be held void and a nullity. It does not expressly hold that such an act is void at all times or for all purposes. Nor does it discuss or intimate what result would have been reached had the bankruptcy proceeding been dismissed. However, Congress has, through § 349, implied that the purposes served by the avoiding powers of Title 11, Chapter 5, cease upon dismissal of the case. Though the Code does not expressly state that improper transfers not affirmatively avoided by a trustee should be treated in the same manner as those actually avoided, I see no persuasive reason why they should not be.

I thus conclude that, under the facts of this case, the perfection of the security interests in the collateral by Associates should be allowed to stand. I find no policy of the Code thwarted by this recognition of the interest of Associates. The primary function of the § 362 stay is to protect the assets of the estate for the benefit of creditors, so that an equitable distribution according to the statutory scheme can be effected. Upon dismissal, the need for this protection is eliminated. Section 349(b) recognizes this fact in its "reinstatement" of all transfers avoided during the pendency of the proceeding.

Eleven days prior to the district court's opinion below, a bankruptcy court in Michigan in the case of *In re*: *Pickett*, 325 B.R. 579 (Bankr. E.D. Mich. 2005) applied the same logic with regard to Section 349. In that case, the court held that where a judgment of foreclosure had been entered and a notice of judgment was filed during the pendency of a prior Chapter 13 proceeding that was later dismissed, the foreclosure was validated, thus rendering the debtor unable to retain whatever property interest it had remaining in a subsequent Chapter 13 proceeding:

> As noted, the Former Case was dismissed. Under 11 U.S.C. § 349, relating to the effect of dismissal, subsection (b)(3) provides that dismissal of a case, "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." (emphasis added). In this case, that entity was either the DNR or the taxing authority. In effect, the dismissal essentially annulled (i.e., terminated as noted) the stay and put the parties back where were at the time of the filing. *See Shell Oil Co. v. Capital Fin. Servs.*, 170 B.R. 903, 906 (S.D. Tex. 1994). Applied to the case at hand, such means that even if there was some merit to Debtor's argument about having had some sort of a justiciable interest in the Property at the time of the filing of the Former Case, the effect of the stay (and anything arguably done in violation thereof) in that case was lost upon dismissal of that case. So when the present case was filed, Debtor had no such interest in the Property which could be made the subject of a Chapter 13 plan . . .

Id. at 582.

In further support of Petitioner's position is *In re Sanderfer*, 2004 U.S. Dist. LEXIS 1139 (E.D. Tenn. 2004), that also follows the same rationale as the district court and is most analogous to this proceeding. In *Sanderfer*, a notice of federal tax lien was filed during the debtor's first bankruptcy proceeding. The bankruptcy court deemed the IRS to be unsecured because of its stay violation during the first proceeding. The district court reversed based on the Sixth Circuit holding in *Easley v. Pettibone Michigan Corporation*, 990 F.2d 905 (6th Cir. 1993). It deemed the perfection to be void but upon dismissal the property was revested in the debtor subject to the federal tax liens. The opinion said nothing about requiring the IRS to seek retroactive annulment of the automatic stay under Section 362(d)(1) based on its actions during the first bankruptcy proceeding that had been dismissed and could not have been reopened.

Also supporting Petitioner's position is *Camecho v. Homeq Servicing Corporation*, 311 B.R. 186 (Bankr. E.D. Mich. 2004), that involved a multiple bankruptcy filer. The debtor's first proceeding was under Chapter 13. During that proceeding the creditor filed an affidavit to create a lien against real estate of the debtor. The debtor did not contest the affidavit and it proposed to pay the creditor in a Chapter 13 plan. That proceeding was dismissed. The debtor then filed a Chapter 7 proceeding. The creditor participated in the second proceeding by filing a secured proof of claim. The creditor began foreclosure proceedings and then the debtor filed a third proceeding, a Chapter 13 proceeding to stay the foreclosure. The debtor contended, for the first time, that the creditor violated the automatic stay in the *first* proceeding. The court agreed that the creditor violated the automatic stays under Section 362(a)(4) and (5) but under

the *Easley* decision, the court held that the action was voidable and it refused to set aside the creditor's action citing to Section 349(b) and other factors such as the treatment of the claim in the prior proceedings.

The district court below recognized case law to the contrary, including *Elbar Inv. v. Pierce (In re Pierce)*, 272 B.R. 198, 211 (Bankr. S. D. Tex. 2001); *In re Prine*, 222 B.R. 610, 613 (Bankr. N.D. Iowa 1997), and *In re Lampkin*, 116 B.R. 450, 453 (Bankr. D. Md. 1990). It disagreed with those decisions because the conclusions in *Prine* and *Lampkin* were based on the concept that stay violations were void. *Elbar*, while arising in the Fifth Circuit, which had adopted the *voidable* rule, was based on the concept that a foreclosure sale in violation of the automatic stay was void unless there was retroactive relief from the stay. 272 B.R. at 210.

5. The State Courts Are in Conflict over the Effect of Dismissal on Stay Violations

Prior to *Sikes v. Global Marine*, the Supreme Court of Texas held in *Goswami v. Metropolitan Savings and Loan Association*, 751 S.W. 2d 487 (Tex. 1988) that stay violations were void and were not cured upon dismissal. *See also*, *Huddleston v. Texas Commerce Bank-Dallas, N.A.*, 756 S.W.2d 343 (Tex. App. – Dallas 1988, writ denied). But in 1996 an intermediate Texas appellate court held that an order of confinement for failure to pay child support that was entered while a debtor was in a bankruptcy proceeding was validated upon dismissal. *Ex Parte Binse*, 932 S.W. 2d 619 (Tex. App. - Houston [14th Dist.] 1996, no pet.). This holding was based on the *Shell Oil Capital* decision. The appellate court did not mention a requirement for retroactive annulment

of the automatic stay, which the Supreme Court of Texas had mentioned in *Goswami*. *Binse* would appear to be in conflict with *Goswami*, except that *Goswami* was decided at a time when stay violations were thought to be void, not voidable. But the "void" argument was carried further in a 2001 opinion in *Oles v. Curl*, 65 S.W.3d 129 (Tex. App. – 2001) another Texas appellate court that held that stay violations were void. The Amarillo court reversed a summary judgment on the grounds that there could be no transfer of real estate based on a void act. The Amarillo Court of Appeals showed its frustration with the conflict over the "void" versus "voidable" rule and called upon the Texas Supreme Court to revisit the issue:

> However, the Supreme Court may wish to revisit the issue given that it has intimated that an automatic stay may be annulled to validate actions taken in contravention of 11 U.S.C. § 362. *Goswami v. Metropolitan Sav. & Loan Ass'n.*, 751 S.W.2d 487, 489 (Tex. 1988). Simply put, if a supposedly void act can be validated then the act cannot actually be void. This is so because a void act is a nullity. *Brazzel v. Murray*, 481 S.W.2d 801, 803 (Tex. 1972) (distinguishing between a void and voidable act); *In re Moreno*, 4 S.W.3d 278, 280-81 (Tex. App.—Houston [14th Dist.] 1999, no writ) (doing the same). And, being a nullity, it cannot be ratified. *Id.* So, there appears to be some conflict between *Goswami* and *Continental Casing* which the Supreme Court may wish to settle.

Id. at 132.

In Arkansas, the appellate court in *Tim Wargo & Sons, Inc. v. The Equitable Life Assurance Society of the United States*, 34 Ark. App. 216, 809 S.W. 2d 375 (1991) followed the voidable rule in its holding:

> Since we have concluded that the transfer at issue was voidable, we point out an additional reason for affirmance. Under 11 U.S.C. § 349(b)(1), the dismissal of a case reinstates those transfers avoided during the bankruptcy action. The court in *In re Linton*, 35 B.R. 695 (Bkrtcy. D. Idaho 1983), found that improper transfers not affirmatively avoided during bankruptcy should be treated in the same manner as those actually avoided. According to this view, the dismissal of the appellant's bankruptcy action would have the effect of reinstating this transfer, which we must assume was not avoided during the bankruptcy proceeding.

Id. at 223.

Likewise, a California appellate court has apparently adopted the voidable rule by holding that dismissal would validate the action that would otherwise violate the automatic stay. *See Valencia v. Rodriquez*, 87 Cal. App. 4th 1222, 105 Cal. Rptr. 2d 281 (2001)(dismissal serves to validate a settlement agreement even if precluded by the automatic stay).

As long as there are dismissals of bankruptcy proceedings, the state courts will continue to inconsistently interpret the impact of Section 349(b) upon stay violations under Section 362.

6. Was Brown's Objection to Petitioner's Lien Rendered Moot upon Dismissal?

The Tenth Circuit holds that a request to lift the automatic stay becomes moot upon dismissal of a petition in bankruptcy and the bankruptcy court loses jurisdiction to decide the motion. *Gardens of Cortez v. John Hancock Mutl. Life Ins. Co.*, 585 F. 2d 975, 978 (10th Cir. 1978). The Fifth Circuit has also held that dismissal of a bankruptcy proceeding renders a creditor's attempt to reject a lease under Section 365 moot. *In re Petty*, 848 F. 2d 654 (5th Cir. 1988) *cert. denied*, 488 U.S. 1009, 109 S. Ct. 794, 102 L. Ed. 2d 785 (1989). Accordingly, if dismissal renders such actions moot, the bankruptcy court loses subject matter jurisdiction to continue the automatic stay provisions after dismissal. *In re Solar Equipment Corporation*, 19 B.R. 1010 (5th Cir. 1982).

Brown's objection to Petitioner's proof of claim on the grounds that Petitioner violated the automatic stays in the prior proceedings was rendered moot because Petitioner could not have sought retroactive annulment of the automatic stay while those proceedings were pending. City Bank, as a single creditor, had no standing to object to Petitioner's proof of claim because creditors have no standing to object to stay violations. *In re Pointer*, 952 F.2d 82 (5th Cir. 1992) Since Brown's objection was moot and City Bank had no standing, there was no subject matter jurisdiction over the objection to Petitioner's proof of claim. Further, the avoidance of Petitioner's lien could only come by way of an adversary proceeding, not by an objection to Petitioner's proof of claim, which was the method used by City Bank and later joined on appeal by the Trustee. Bankruptcy Rule 7001(2); *In re Kinion*, 207 F. 3d 751 (5th Cir. 2000); *Cen-Pen Corp. v. Hanson*, 58 F. 3d 89 (4th Cir. 1995).

This Court should reverse the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PERRY J. COCKERELL
Counsel of Record
CANTEY & HANGER, LLP
1999 Bryan Street, Suite 3330
Dallas, Texas 75201
214-978-4139

STEPHEN L. TATUM
DONALD K. BUCKMAN
CANTEY & HANGER, LLP
801 Cherry Street, Suite 2100
Fort Worth, Texas 76102
817-877-2800

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 4, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-10872

In The Matter Of: LARRY BROWN

Debtor

CITY BANK; SCOTT SEIDEL

Appellants

v.

INDUSTRIAL BANK NA

Appellee

Appeal from the United States District Court
for the Northern District of Texas
No. 4:05-CV-35

Before KING, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

The order of the bankruptcy court was correct for the reasons well set out in its Memorandum Opinion and Order; therefore, we REVERSE the judgment of the district court. The district court erred as a matter of law in concluding that the dismissal of the two previous bankruptcy proceedings necessarily served both to lift the automatic stay and to cleanse the appellee's violations of the stay. *In re Brown*, 330 B.R. 548, 553 (N.D. Tex. 2005) (stating that "11 U.S.C. § 349(b) caused the dismissals of Cases 1 and 2 to have the effect of validating actions taken . . . during the pendency of those cases"). The bankruptcy court correctly recognized that the dismissal of a bankruptcy proceeding does not necessarily retroactively validate actions taken in violation of an automatic stay. Rather, the retroactive validation of actions taken in violation of an automatic stay is reserved to the *discretion* of bankruptcy courts, and they are cautioned to use this discretion sparingly because of the adverse impact that validation could have on other creditors who honored the stay. *See, e.g., In re Cueva*, 371 F.3d 232, 236 (5th Cir. 2004) (stating that bankruptcy courts have "broad discretion" to grant or to deny retroactive annulment or modification of an automatic stay); *In re Thornburg*, 277 B.R. 719, 731 (Bankr. E.D. Tex. 2002) (stating that bankruptcy courts should grant retroactive relief for actions that violated an automatic stay only in exceptional circumstances). The bankruptcy court correctly exercised that discretion here.

The final judgment of the district court is REVERSED, and the Memorandum Opinion and Order of the bankruptcy court is AFFIRMED. Costs shall be borne by appellee.

APPENDIX B — MEMORANDUM OPINION AND ORDER, AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION DECIDED AND FILED JUNE 21, 2005

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

NO. 4:05-CV-035-A

IN RE: LARRY BROWN,

Debtor.

INDUSTRIAL BANK N.A.,

Appellant,

VS.

LARRY BROWN, ET AL.,

Appellees.

June 21, 2005, Decided
June 21, 2005, Filed

JUDGE: JOHN McBRYDE, United States District Judge.

Appendix B

MEMORANDUM OPINION and ORDER

This action comes before the court as an appeal from an order of the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, the Honorable Dennis Michael Lynn presiding. The court, having considered the briefs of appellant, Industrial Bank N.A., and appellee City Bank[1], the record on appeal, and applicable authorities, finds that the bankruptcy court's order should be reversed for the reasons given below.

I.

Jurisdiction

The appeal is from an order sustaining an objection to appellant's secured claim and denying its alternative motion to annul automatic stays. The court is satisfied that the order is final and appealable. *See Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1284 (2d Cir. 1990). This court's jurisdiction exists pursuant to 28 U.S.C. § 158.

II.

Underlying Proceedings

The description of pertinent facts given by the bankruptcy court is sufficient for purposes of this opinion:

---

1. Appellee Larry Brown, the debtor, has not filed a brief or anything else in response to appellant's brief on appeal.

Appendix B

On August 5, 2002, Debtor [appellee Larry Brown] filed a voluntary petition ("Case 1") under chapter 13 of the Bankruptcy Code. Case 1 was initially dismissed on October 16, 2002; reinstated on November 19, 2002, pursuant to a timely motion; and finally dismissed on May 21, 2003. Although City Bank was not listed as a creditor on Debtor's original schedules, City Bank filed a Notice of Appearance and Request for Service of Papers as "a creditor of, and a party in interest in this [Case 1]" on December 11, 2002, and filed a proof of claim on January 27, 2003. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 1. During the pendency of Case 1, Industrial Bank sued Debtor on September 23, 2002; obtained a default judgment (the "Judgment") on February 10, 2003, and recorded the Judgment against Debtor on March 28, 2003.

On June 3, 2003, thirteen days after dismissal of Case 1, Debtor filed a voluntary petition ("Case 2") under chapter 11 of the Code. Case 2 was dismissed on January 7, 2004. City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 2. During the pendency of Case 2, Industrial Bank obtained in connection with the Judgment a writ of execution against Debtor on

> June 25, 2003, and gave Debtor notice of levy under the writ of execution on August 28, 2003.
>
> On February 27, 2004, fifty-one days after dismissal of Case 2, Debtor filed the above-captioned chapter 11 case ("Case 3"). City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 3. On March 19, 2004, during the pendency of Case 3, Industrial Bank obtained in connection with the Judgment an order granting post-judgment sanctions against Debtor.
>
> On March 26, 2004, Industrial Bank received notice of Case 3 and in April 2004 learned of Debtor's Case 1 and Case 2. On May 20, 2004, Industrial Bank filed in Case 3 a secured creditor Proof of Claim based on the Judgment.

Nov. 10, 2004, Mem. Op. & Order at 2-3 (footnote omitted). The August 2003 levy under the writ of execution was on a deferred compensation contract debtor had with the Oakland Raiders.

City Bank objected to appellant's claim, asserting that all actions taken by appellant during the pendency of Cases 1 and 2 were in violation of the automatic stays. City Bank requested the bankruptcy court to disallow appellant's claim as a secured claim and, at best, to allow the claim as an unsecured claim. Appellant, on the other hand, filed an

alternative motion to annul the automatic stays as to Cases 1 and 2 retroactively so that its claim would be secured. Also, appellant argues that City Bank lacked standing to challenge appellant's claim. Three days before the hearing, debtor, appellee Larry Brown, filed documents by which he joined in City Bank's filings.

On September 27, 2004, the bankruptcy court held a hearing to consider motions filed by appellant and City Bank. After considering supplemental materials filed by the parties, on November 10, 2004, the bankruptcy court issued its memorandum opinion and order (a) sustaining the objection to appellant's secured claim, (b) denying appellant's motion to annul the automatic stays, (c) denying as moot City Bank's alternative motion for authority to avoid post-petition attachment of appellant's security interest, and (d) allowing appellant's claim as a general unsecured nonpriority claim. Appellant appeals from that order.

II.

Issues on Appeal

Appellant sets forth six issues on appeal. They are:

(1) whether the bankruptcy court erred in sustaining City Bank's objection to the secured status of appellant's claim;

(2) whether City Bank did not have the requisite legal standing to object to appellant's claim;

(3) whether the bankruptcy court erred in failing to find that a challenge to the post-petition fixing of appellant's lien was time-barred pursuant to 11 U.S.C. § 549 and *In re Pointer*, 952 F.2d 82 (5th Cir. 1992);

(4) whether the bankruptcy court erred in failing to find that the dismissal of debtor's previous bankruptcy cases voided the automatic stays and validated any action taken by appellant while the previous cases were pending;

(5) whether, in view of the undisputed evidence presented by appellant, the bankruptcy court erred in failing to find cause to annul the automatic stay and grant appellant's motion to annul the automatic stay; and

(6) whether the bankruptcy court erred in determining that the debtor's untimely joinder in City Bank's objection to appellant's claim and alternative motion for authority to avoid post-petition attachment of alleged security interest of appellant rendered the issue of City Bank's standing moot.

IV.

Discussion

A. *Whether Standing is an Issue.*

Appellant contends City Bank lacks standing to contest appellant's secured claim, relying on *City of Farmers Branch v. Pointer (In re Pointer)*, 952 F.2d 82 (5th Cir. 1992). *Pointer*, however, is not in point as to City Bank's contest to appellant's claim. There, the court focused its attention on

standing under 11 U.S.C. § 549. Here, City Bank's standing is established pursuant to 11 U.S.C. § 502(a), which authorizes "any party in interest" to object to a claim.[2] Moreover, debtor's joinder in City Bank's objection to appellant's claim renders moot the issue of City Bank's standing. The bankruptcy court did not err in giving effect to debtor's joinder.

B. The Dismissals of Cases 1 and 2 Had the Effect of Nullifying the Stay as to Actions Appellant Took During Pendency of Those Cases.

Automatic stays pursuant to 11 U.S.C. § 362 were in effect during the pendency of Cases 1 and 2. *See Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 236 (5th Cir. 2004). Actions taken by appellant against debtor or his property while those stays were in effect were subject to the stays even though appellant had no knowledge that the cases had been filed. *Id.* Appellant's actions, when they were taken, against debtor and his property during the pendency of the cases were voidable. *See Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) (saying "[w]e are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void"). *See also Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990).

---

2. Because the court has upheld City Bank's right to object to appellant's claim, the motion City Bank filed September 16, 2004, titled "City Bank's Alternative Motion for Authority to Avoid Post-Petition Attachment of Alleged Security Interest of Industrial Bank, N.A.," continues to be moot.

Appendix B

In a footnote in *Jones v. Garcia (In re Jones)*, a panel of the Fifth Circuit explained that the statements in *Picco* and *Sikes* that actions taken in violation of the stay are voidable, and not void, really mean that "[i]t is the effect of the stay *itself* which is voidable, subject to the broad discretion afforded a bankruptcy court under section 362." 63 F.3d 411, 413 n. 3 (5th Cir. 1995). Regardless of the meaning the respective panels of the Fifth Circuit had in mind when they made the "voidable" statements in *Picco* and *Sikes*, the end result would be the same—actions taken in violation of the stay are subject to being cleansed of the effect of the stay by subsequent action of the bankruptcy court. *See Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.)*, 345 F.3d 338, 344 (5th Cir. 2003) (expressing the view of the Fifth Circuit in 2003 that "violations [of the automatic stay] are merely 'voidable' and are subject to discretionary 'cure' "). Such a view is consistent with the primary function of a § 362 stay, for, as one court explained:

> The primary function of the § 362 stay is to protect the assets of the estate for the benefit of creditors, so that an equitable distribution according to the statutory scheme can be effected. Upon dismissal, the need for this protection is eliminated. [Title 11 U.S.C. §] 349(b) recognizes this fact in its "reinstatement" of all transfers avoided during the pendency of the proceeding.

In re Linton, 35 B.R. 695, 697 (Bankr. D. Idaho 1983).

In *Linton*, the court relied on 11 U.S.C. § 349(b) when recognizing as valid voidable action taken against the

debtor's property during existence of the automatic stay, explaining that the court found "no policy of the Code thwarted by this recognition. . . ." *Id.*[3]

The court has concluded that 11 U.S.C. § 349(b) caused the dismissals of Cases 1 and 2 to have the effect of validating

---

3. Title 11 U.S.C. § 349(b) reads:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title —
>
> (1) reinstates —
>
> (A) any proceeding or custodianship superseded under section 543 of this title;
>
> (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
>
> (C) any lien voided under section 506(d) of this title;
>
> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

actions taken by appellant during the pendency of those cases. In other words, the orders of dismissal of Cases 1 and 2, when considered with § 349(b), were orders of the bankruptcy court that annulled whatever effect the automatic stays resulting from those cases otherwise had on actions taken by appellant. As the court deciding *Shell Oil Co. v. Capital Financial Services* explained:

> Liens that violate the automatic stay are voidable at the trustee's discretion, but they are not automatically void. When a bankruptcy is dismissed, the property of the estate revests in the entity that held the property immediately before the case began. 11 U.S.C. § 349(b)(3). The dismissal also ends the automatic stay and it acts, in effect, as a grant of relief from any automatic stay. . . .
>
> If the automatic stay was in effect when the IRS filed its lien against Gibson, the dismissal of the bankruptcy case terminated the stay and vested the interpleaded funds in Gibson. Since the trustee of Gibson's bankruptcy estate never avoided the IRS lien, the dismissal, essentially, acts as a grant of relief from the stay. Rather than void the lien, the dismissal voids the stay, and voids it from its inception. . . .

170 B.R. 903, 906 (S.D.Tex.1994) (citations and internal quotation marks omitted). *See also Norton v. Hoxie State Bank*, 61 B.R. 258, 260 (D. Kan. 1986) (recognizing that

"[a] dismissal of a bankruptcy case acts, in effect, as a grant of relief from any automatic stay previously in effect").

The effect of § 349(b), which is subject to interpretation, was clarified by the following legislative history:

> The basic purpose of [§ 349(b)] is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.

S. REP. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835. For Cases 1 and 2 to be undone as to appellant, the effect of the stays on actions taken by appellant during the pendency of those cases would have to be negated. And, for appellant's rights to be restored to the positions they enjoyed at the commencement of Cases 1 and 2, appellant would have to be given the benefit of actions appellant took in the exercise of those rights during the pendency of those cases.

The court recognizes that there is case authority that supports City Bank's argument that dismissal of a bankruptcy case does not validate action taken in violation of the automatic stay. *See Elbar Inv., Inc. v. Pierce (In re Pierce)*, 272 B.R. 198, 211 (Bankr. S.D. Tex. 2001); *In re Prine*, 222 B.R. 610, 613 (Bankr. N.D. Iowa 1997); *In re Lampkin*, 116 B.R. 450, 453 (Bankr. D. Md. 1990). The court respectfully disagrees with the conclusions reached in those cases on the subject under discussion. Of possible significance, the *In re Prine* and *In re Lampkin* courts thought it important to their decisions to ascertain whether the actions taken in violation of a stay were void or voidable, and each

court ruled as it did because its circuit had held that actions taken in violation of a stay are void. The *In re Lampkin* court mentioned that "[t]he Fifth Circuit believes that violations of the stay are voidable," citing *Sikes*. 116 B.R. at 451. The holding in *In re Pierce* seems to have been influenced by a principle of Texas real property law "that a judicial sale in violation of Bankruptcy Code section 362 has no effect, even if the parties did not have notice of the stay, unless a bankruptcy judge grants retroactive relief from the stay." 272 B.R. at 210.

The bankruptcy court agreed with appellant that debtor should not be allowed to benefit from the protections of the automatic stays applicable to Cases 1 and 2, but concluded that City Bank and other creditors in Case 3 "should not suffer a detriment because Debtor failed to give notice of its bankruptcy filings to [appellant]."[4] Mini-Record, Vol. 1 at 9. In the course of concluding that appellant's claim should not be allowed as a secured claim, the bankruptcy court explained:

> Because allowance of the Judgment as a secured claim (1) would improve Industrial Bank's

---

4. The court is unable to find anything in the record showing that treating appellant's claim as a secured claim would cause City Bank or any other creditor in Case 3 to suffer any detriment because debtor failed to give notice to appellant of his filings of Cases 1 and 2. There is nothing in the record to reflect that appellant gained an unfair advantage because it did not have notice of the automatic stays — there is nothing in the record to show that City Bank or any other creditor would have done anything to improve their respective positions as creditors if they had not known of the automatic stays or if Cases 1 and 2 had not been filed.

> creditor status to the prejudice of City Bank and those other creditors obedient to the mandates of the automatic stay and (2) would not further the purposes of the Code and the equitable distribution of Debtor's assets among creditors, the court is convinced that the Judgment should not be allowed as a secured claim with a perfected lien against the deferred contract proceeds.

Id. Those comments of the bankruptcy court would appear to be appropriate to a discussion of appellant's alternative motion to annul the automatic stay, the resolution of which could take into account equitable considerations. However, there is no hint in the language of § 349 or its legislative history that the cleansing effect of the dismissal of a case under Title 11 is dependent on factors such as those to which the bankruptcy court directed its attention. As introductory language of § 349(b) suggests, the effect of the statute can be modified on a case-by-case basis "for cause," but that modification would have to be made at the time and as a part of the dismissal of the case.

City Bank focuses in its brief on what it characterizes as appellant's "wrongful conduct" and "improper head start," Appellee's Br. at 16, implying that appellant engaged in improper conduct when it took the actions about which debtor and City Bank complain. But, there is no evidence that appellant had knowledge of the stays when it took those actions; and, the findings of the bankruptcy court on that subject, which are not challenged, are that appellant did not have knowledge of the stays. *Supra* at 2-3. Moreover, the court is of the belief that knowledge of the stays, *vel non*,

is not relevant to the issue under discussion. But, the court is not expressing an opinion as to what appellant's rights would be if it had knowingly violated the stays.

For the reasons given above, the court concludes that the actions taken by appellant during the stays related to Cases 1 and 2 should be given effect, and that the bankruptcy court erred in failing to do so. Because the court's ruling is based on the effect of § 349(b), the court is not required to reach issues related to appellant's alternative motion to annul automatic stays as to Cases 1 and 2, and declines to do so.[5]

V.

Order

For the reasons discussed herein,

The court ORDERS that the order of the bankruptcy court sustaining the objection to appellant's secured claim be, and is hereby, reversed.

The court further ORDERS that the bankruptcy court treat appellant's claim as a secured claim by giving appellant the benefit of actions appellant took during the pendency of Cases 1 and 2, including, but not limited to, the obtaining of

---

5. The court does note, however, that the bankruptcy court appears to have been incorrect in its statement that appellant's allegations relative to its expenditures are unsubstantiated. *See* Mini-Record, Vol. 1 at 11. There was testimony that appellant incurred legal fees in excess of $80,000.00 in connection with its collection actions. R. at 328.

a default judgment on February 10, 2003, recording that judgment on March 28, 2003, obtaining a writ of execution against debtor on June 25, 2003, and giving debtor and the Oakland Raiders notice of levy under the writ of execution on August 28, 2003.

SIGNED June 21, 2005.

s/ John McBryde
JOHN McBRYDE
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

NO. 4:05-CV-035-A

IN RE: LARRY BROWN,

Debtor.

INDUSTRIAL BANK N.A.,

Appellant,

VS.

LARRY BROWN, ET AL.,

Appellees.

FINAL JUDGMENT

In accordance with the court's memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES, and DECREES that the November 10, 2004, order of the bankruptcy court sustaining the objection to the secured claim of appellant, Industrial Bank, N.A., be, and is hereby, reversed.

The court further ORDERS, ADJUDGES, and DECREES that the bankruptcy court treat the claim of

appellant as a secured claim by giving appellant the benefit of actions appellant took during the pendency of Cases 1 and 2, including, but not limited to, the obtaining of a default judgment on February 10, 2003, recording that judgment on March 28, 2003, obtaining a writ of execution on June 25, 2003, and giving Larry Brown, debtor, and the Oakland Raiders notice of levy under the writ of execution on August 28, 2003.

The court further ORDERS, ADJUDGES, and DECREES that appellant have and recover from appellee, City Bank, all costs of appeal incurred by appellant.

SIGNED June 21, 2005.

s/ John McBryde
JOHN McBRYDE
United States District Judge

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION DATED NOVEMBER 15, 2004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CASE NO. 04-42064-DML-11

IN RE:

LARRY BROWN,

Debtor.

MEMORANDUM OPINION AND ORDER

Before the court is City Bank's Objection to the Claim of Industrial Bank, N.A. (the "Objection") filed June 23, 2004. Industrial Bank's Response in Opposition to City Bank's Objection was filed July 12, 2004; and City Bank's Reply to Industrial Bank's Response was filed September 21, 2004. Larry Brown's ("Debtor") Joinder in the Objection was filed September 24, 2004.

Also before the court is the Motion of Industrial Bank to Annul Automatic Stay (the "Motion to Annul") filed August 26, 2004. City Bank's Response to Industrial Bank's Motion to Annul was filed September 10, 2004, and Industrial Bank's Reply in Support of Its Motion to Annul was filed September 24, 2004. Debtor's Joinder in City Bank's Response to the Motion to Annul was also filed September 24, 2004.

Appendix C

Also before the court is City Bank's Alternative Motion for Authority to Avoid Postpetition Attachment of Alleged Security Interest of Industrial Bank (the "Alternative Motion") filed September 16, 2004. Industrial Bank's Response to the Alternative Motion was filed September 24, 2004.

A hearing on the Objection, the Motion to Annul, and the Alternative Motion was held on September 27, 2004. At the conclusion of the hearing, the court invited the parties to submit supplemental briefs relevant to the issues raised at the hearing and took the matter under advisement. Both City Bank and Industrial Bank filed Supplemental Briefs on October 4, 2004.

I. BACKGROUND

The facts of this case are largely undisputed. On August 5, 2002, Debtor filed a voluntary petition ("Case 1") under chapter 13 of the Bankruptcy Code.[1] Case 1 was initially dismissed on October 16, 2002; reinstated on November 19, 2002, pursuant to a timely motion; and finally dismissed on May 21, 2003. Although City Bank was not listed as a creditor on Debtor's original schedules, City Bank filed a Notice of Appearance and Request for Service of Papers as "a creditor of, and a party in interest in this [Case 1]" on December 11, 2002, and filed a proof of claim on January 27, 2003. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 1. During the pendency of Case 1, Industrial Bank sued Debtor on September 23, 2002; obtained a default judgment (the "Judgment") on February 10, 2003, and recorded the Judgment against Debtor on March 28, 2003.

1. 11 U.S.C. §§ 101-1330 (2004) (hereafter the "Code").

Appendix C

On June 3, 2003, thirteen days after dismissal of Case 1, Debtor filed a voluntary petition ("Case 2") under chapter 11 of the Code. Case 2 was dismissed on January 7, 2004. City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 2. During the pendency of Case 2, Industrial Bank obtained in connection with the Judgment a writ of execution against Debtor on June 25, 2003, and gave Debtor notice of levy under the writ of execution on August 28, 2003.

On February 27, 2004, fifty-one days after dismissal of Case 2, Debtor filed the above-captioned chapter 11 case ("Case 3"). City Bank was listed by Debtor on Schedule D as a secured creditor and on Schedule F as an unsecured nonpriority creditor. Industrial Bank was not listed as a creditor of Debtor and did not receive notice of Case 3. On March 19, 2004, during the pendency of Case 3, Industrial Bank obtained in connection with the Judgment an order granting post-judgment sanctions against Debtor.

On March 26, 2004, Industrial Bank received notice of Case 3 and in April 2004 learned of Debtor's Case 1 and Case 2. On May 20, 2004, Industrial Bank filed in Case 3 a secured creditor Proof of Claim based on the Judgment.

II. DISCUSSION

Pursuant to the provisions of sections 502 and 506 of the Code, City Bank objects to Industrial Bank's claim and asserts that all actions taken by Industrial Bank during the

pendency of Cases 1, 2, and 3 to obtain, perfect, and enforce the Judgment were in violation of the automatic stay provisions of sections 362(a)(1)-(a)(5)[2] of the Code. City

---

2. Section 362 provides in relevant part:

> (a) [A] petition filed . . . under this title . . . operates as a stay, applicable to all entities, of –
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

Code §§ 362(a)(1)-(a)(5).

Appendix C

Bank's Objection asks this court to disallow Industrial Bank's claim as a secured claim and, at best, to allow as unsecured any claim established by Industrial Bank pursuant to the Judgment. Industrial Bank argues that (1) creditor City Bank lacks standing to challenge Industrial Bank's claim; (2) the dismissal of Case 1 terminated the automatic stay and retroactively validated Industrial Bank's actions in connection with the Judgment; and (3) regardless of the effect of the dismissal of Case 1, cause exists for this court to annul the automatic stay and to retroactively validate the Judgment and allow Industrial Bank's secured claim.

Consistent with its position in response to City Bank's Objection, Industrial Bank's Motion to Annul maintains that cause exists for this court to annul the automatic stay and to retroactively validate Industrial Bank's actions taken to obtain, perfect, and enforce the Judgment, notwithstanding Debtor's filing of Cases 1, 2, and 3. City Bank argues that retroactive validation of Industrial Bank's Judgment as a secured claim would unfairly allow Industrial Bank to improve its position over the claims of those unsecured nonpriority creditors who faithfully adhered to the strictures of the automatic stay.

Finally, City Bank's Alternative Motion seeks this court's *imprimatur* for City Bank to act in Debtor's stead in objecting to Industrial Bank's claim. City Bank argues that authority for City Bank to act on Debtor's behalf should be granted because Debtor failed to raise an objection to Industrial Bank's claim despite City Bank's repeated requests for Debtor to do so and, indeed, despite Debtor's *duty* to do so. Industrial Bank responds that City Bank lacks a colorable claim and

should therefore not be granted authority to act on behalf of Debtor.[3]

First. It is well established that the "purposes of the bankruptcy stay . . . are 'to protect the debtor's assets, provide temporary relief from creditors, and *further equity of distribution among the creditors* by forestalling a race to the courthouse.' " *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) (emphasis added). *See also GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985) (same); *Singleton v. Abusaad (In re Abusaad)*, 309 B.R. 895, 897 (Bankr. N.D. Tex. 2004) (same); *Elbar Invs., Inc. v. Pierce (In re Pierce)* (hereafter *"Pierce I"*), 272 B.R. 198, 203-04 (Bankr. S.D. Tex. 2001) ("The stay is intended to benefit both debtors and creditors by assuring an equitable distribution of the debtor's assets and by preventing a race to the courthouse.").

Industrial Bank asks this court to overrule City Bank's Objection and to allow Industrial Bank's Judgment as a secured claim with a perfected lien against Debtor's National Football League deferred contract payments. Though the court agrees with Industrial Bank that Debtor should not be allowed to benefit from the protections of the automatic stay by remaining "stealthily silent," *see In re Smith Corset Shops, Inc.*, 696 F.2d 971, 977 (1st Cir. 1982), while Industrial Bank obtained the Judgment from state court, the court also

---

3. Although it is likely this court would have granted City Bank's Alternative Motion based on the plain language of section 502(b) of the Code which allows a "party in interest" to object to a filed claim, Debtor's subsequent Joinder in the Objection and Joinder in the Motion to Annul effectively rendered the Alternative Motion moot.

believes that City Bank and other creditors in this case should not suffer a detriment because Debtor failed to give notice of its bankruptcy filings to Industrial Bank. Because allowance of the Judgment as a secured claim (1) would improve Industrial Bank's creditor status to the prejudice of City Bank and those other creditors obedient to the mandates of the automatic stay and (2) would not further the purposes of the Code and the equitable distribution of Debtor's assets among creditors, the court is convinced that the Judgment should not be allowed as a secured claim with a perfected lien against the deferred contract proceeds.

Second. It is well established that the stay is effective "regardless of whether creditors have knowledge of the stay's applicability." *Elbar Invs., Inc. v. Pierce (In re Pierce)* (*"Pierce II"*), 91 Fed. Appx. 927, 928 (5th Cir. 2004). *See also Bustamante v. Cueva (In re Cueva)*, 371 F.3d 232, 236 (5th Cir. 2004) (determining that actions in violation of the automatic stay under section 362 of the Code are invalid, "whether or not a creditor acts with knowledge of the stay"); *In re Abusaad*, 309 B.R. at 898 (finding that sheriff's sale violated automatic stay regardless of whether sheriff or purchaser had knowledge of the filing of the petition); *Pierce I*, 272 B.R. at 203 ("The stay is not a judicial injunction that depends on notice. The stay is effective upon the filing of the case, regardless of notice.").

Industrial Bank does not dispute that its actions taken to obtain, perfect, and enforce the Judgment were taken while the automatic stay was in effect postpetition and during the pendency of Cases 1, 2, and 3, albeit unknown to Industrial Bank at the time its actions were taken because Industrial

Bank had not received notice of Debtor's filings. However, because the automatic stay in Debtor's Cases 1, 2, and 3 was effective upon the filing of the cases regardless of notice to Industrial Bank, the court holds that Industrial Bank's actions taken postpetition and during the pendency of Cases 1, 2, and 3 violated the automatic stay notwithstanding that Industrial Bank had no actual notice of Debtor's filings.

Third. It is firmly established in the Fifth Circuit that actions in violation of the automatic stay are not void *ab initio* and incurable but, rather, "are merely 'voidable' and are subject to discretionary 'cure.' The Fifth Circuit's position rests on the bankruptcy court's statutory power to annul the automatic stay, i.e., to 'lift the automatic stay retroactively and thereby validate actions which otherwise would be void."[4] *Chapman v. Bituminous Ins. Co.* (*In re Coho Res., Inc.*), 345 F.3d 338, 344 (5th Cir. 2003). *See also In re Abusaad*, 309 B.R. at 899 (clarifying that unless and until an action taken in violation of the automatic stay "is made valid by subsequent judicial action annulling the automatic stay," it is clear that such action is invalid and of no effect); *In re Cueva*, 371 F.3d at 236 n.2 (noting that the bankruptcy court is afforded broad discretionary authority to retroactively annul the automatic stay to validate actions taken in violation of the stay); *Thornburg v. Lynch* (*In re Thornburg*), 277 B.R. 719, 731 (Bank. E.D. Tex. 2002) ("Bankruptcy courts ordinarily must hold those who defile the automatic stay to the predictable consequences of their actions and can grant

4. Section 362(d) authorizes the bankruptcy court to "grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay. . . . " Code § 362(d).

retroactive relief only sparingly and in compelling circumstances.") (citation omitted); *Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412 (5th Cir. 1995) (affirming that "actions taken in violation of the automatic stay are not *void*, but rather they are merely *voidable*, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d)") (emphasis in original); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989) ("The power to annul authorizes the court to validate actions taken subsequent to the impressing of the section 362(a) stay.").

Industrial Bank insists that compelling circumstances exist to annul the automatic stay and retroactively validate its Judgment. *See In re Thornburg*, 277 B.R. at 731 n.18 (setting forth examples of circumstances considered compelling by courts in granting such extraordinary relief, including (1) if the creditor had actual or constructive knowledge of the bankruptcy filing; (2) if the debtor has acted in bad faith; (3) if there was equity in the property of the estate; (4) if the property was necessary for an effective reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; and (7) if the creditor has detrimentally changed its position on the basis of the action taken). Even assuming *arguendo* that Debtor's failure to give Industrial Bank notice of the Cases was unreasonable, Industrial Bank has offered nothing more than (1) conclusory allegations that it detrimentally changed its position based on lack of notice of the Cases; (2) speculative conclusions that it would have prevailed had a motion for relief been granted prior to the violation; and (3) unsubstantiated

allegations of past or anticipated unnecessary expenditures. Indeed, the equities in this case weigh in favor of the court's belief that Industrial Bank must share the same unsecured nonpriority creditor status in Case 3 as the other unsecured nonpriority claimants and that Industrial Bank should not be allowed to reap benefits resulting from its violation of the statutory automatic stay.[5] *See Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 975 (1st Cir. 1997) (explaining that the automatic stay "safeguards . . . creditors by preventing 'different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all . . . to capture the lion's share of the debtor's assets' "); *In re U. S. Physicians, Inc.*, 236 B.R. 593, 605-06 (Bankr. E.D. Pa. 1999) (determining that "unsecured creditors are generally entitled to relief only where they have demonstrated that the debtor had engaged in morally culpable conduct" and unsecured creditors who are denied relief "will simply share the same financial status with the other frustrated" creditors).

It appears from the record that City Bank and Debtor's other creditors hold claims that antedate Industrial Bank's violations of the stay. Had the claims of creditors arisen after Industrial Bank recorded its judgment, thus putting creditors on notice, the result here might be different. But where, as here, Debtor's three filings were intended to restructure the

---

5. The test fashioned by the *In re Thornburg* court involved enforcement of a valid lien. Industrial Bank asks much more of this court. Industrial Bank asks this court to permit it to take advantage of its stay violations to bootstrap itself into a position ahead of other creditors who otherwise would be treated on a parity with Industrial Bank.

same debt, it would frustrate Congress's intent to recognize as valid Industrial Bank's secured claim.[6]

Therefore, because Industrial Bank has failed to show compelling circumstances for this court to disregard the safeguards of the automatic stay and, consistent with the court's reasoning *supra*, the court declines to (1) annul the stay; (2) retroactively validate Industrial Bank's actions taken to obtain, perfect, and enforce the Judgment in violation of the stay; and (3) elevate Industrial Bank's creditor status regarding the Judgment over those creditors' claims made in compliance with the terms of the automatic stay.

CONCLUSION

Having conducted a hearing, received evidence and testimony, and reviewed the record before the court, and the court hereby **SUSTAINS** the Objection to Industrial Bank's secured claim; **DENIES** the Motion to Annul; and **DENIES** as moot the Alternative Motion. Industrial Bank's claim shall be **ALLOWED** as a general unsecured nonpriority claim.

SO ORDERED this __ day of November 2004.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

---

6. The court notes that Debtor was the subject of a bankruptcy proceeding during all times pertinent to the matter at hand except for 62 days. Under Code section 108(a), *cf.* Code section 546(a)(1), pendency of a bankruptcy tolls the time for commencing suits. Thus, Industrial Bank's lien might in any case be attacked in Case 3 as a preference. *See* Code § 547(b).

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 31, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-10872

In The Matter Of: LARRY BROWN

Debtor

CITY BANK; SCOTT SEIDEL

Appellants

v.

INDUSTRIAL BANK NA

Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING

Before KING, STEWART, and DENNIS, Circuit Judges.

Appendix D

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Carolyn [illegible] King
United States Circuit Judge